IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 198 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME-TAX

Versus

MULCHAND MAGANLAL KAPADIA

Appearance:

MR BB NAYAK FOR MR MANISH R BHATT for Applicant.

SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 09/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this reference at the instance of the revenue, the following questions have been referred for the respective assessment years mentioned hereinafter :-

For assessment Years :1973-74, 1974-75 and 1975-76 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in dismissing the department's appeal holding that the income cannot be assessed in the hands of the assessee u/s.64(1)(ii) of the Act ?"

For assessment Years : 1976-77 to 1980-81 :

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in dismissing the department's appeal holding that the income cannot be assessed in the hands of the assessee u/s. 64(1)(iii) of the Act ?"

2 We have heard Mr.B.B.Nayak, learned Counsel for the applicant-revenue. Though served none appears for the respondent-assessee.

3 The assessee was a partner in the firm representing his HUF. While framing the assessment the I.T.O. held that the income of the minor sons of the assessee who were admitted to benefits of partnership in the said firm was includible in the hands of the assessee in his individual capacity. This was sought to be done in view of the provisions of section 64(1)(ii) for the assessment years 1973-74 to 1975-76 and under the provisions of section 64(1)(ii) for the remaining assessment years 1976-77 to 1980-81. The Appellate Assessment Commissioner cancelled the assessment framed by the I.T.O. relying on the decision of this Court in Dinubhai Ishvarlal Patel vs. I.T.O., 118 ITR 122, apart from the noting that some of the minor sons had become major during some of the years under consideration. The AAC also opined that since the assessee as an individual has no other income there was no question of any inclusion of the income of the minor children with the income of the assessee as an individual. The Tribunal confirmed the order of the AAC by relying on the same decision of this Court in Dinubhai Ishvarlal Patel's case (Supra). Hence, this reference at the instance of the revenue.

4 At the hearing of this reference our attention has been invited to the decision of this Court in C.I.T. vs. Vallabhdas Manjibhai (1997) 163 ITR 59, wherein this

Court followed the decision in Dinubhai Patel's case (Supra). The decision of this Court in the aforesaid case has been confirmed by the Apex Court in C.I.T. vs. Om Prakash & Ors., 217 ITR 785.

5 Mr.Nayak, learned Counsel for the revenue, however, submits that since the department's appeal against the decision of this Court in Dinubhai Patel's case (Supra) is pending before the Apex Court, the controversy may not be treated to have been finally concluded. In view of the decision of the Apex Court in C.I.T. vs. Om Prakash (Supra), we do not think that we should keep this reference of 1990 pending. Following the aforesaid decision in case of C.I.T. vs. Om Prakash (Supra), we are of the view that the Tribunal was right in law in holding that the income in question could not be assessed in the hands of the assessee under section 64(1)(ii) or 64(1)(iii) of the Act for any of the aforesaid assessment years under consideration.

6 Accordingly, our answer to both the questions is in the affirmative i.e. in favour of the assessee and against the revenue.

7 The reference stands disposed of accordingly with no order as to costs.

Sd/- Sd/-
(M.S.Shah,J) (D.A.Mehta, J)

m.m.bhatt